

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Pre-Notice Discussion:
❖ Amendment to Regulation 18702.4: Exceptions.
❖ Proposed Adoption of Regulation 18750.2: Procedures for the Promulgation and Adoption of Conflict of Interest Codes for State Agencies Exempt from the Administrative Procedures Act.
❖ Adoption of Regulation 18755: Statements Of Economic Interest: Person or Persons at an Institution of Higher Education with Principal Responsibility for a Research Project.

Date: January 28, 2005

I. Executive Summary

Conflict of Interest Codes: Generally, under the Political Reform Act (the “Act”),¹ public officials, such as employees, members of boards and commissions or consultants of a state or local government agency, disclose their financial interests in accordance with the conflict of interest code developed by their respective agencies. (Section 87300 et seq.) A code designates positions required to file Statements of Economic Interests (“SEI”), and assigns disclosure categories specifying the types of interests to be reported. Most agencies use the standard conflict of interest code developed by the Commission in regulation 18730.

A conflict of interest code is both adopted by a state agency and approved by the Fair Political Practices Commission (the “Commission”) as the code reviewing body. According to the Act, these codes are adopted by the state agency consistent with the Administrative Procedures Act (“APA”).

However, certain state agencies, such as the University of California (“UC”) and the Legislature are not subject to the APA. Due to this fact, over the years Commission staff and these agencies have developed hybrid procedures for enacting codes and code amendments. Staff is asking the Commission to consider adoption of regulation 18750.2 to codify a procedure for agencies that are not subject to the APA.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

Reporting by Person or Persons at an Institution of Higher Education with Principal Responsibility for a Research Project: Under the Act, all public officials must disclose all of his or her economic interests that could foreseeably be affected by the exercise of the official's duties. In addition, public officials are prohibited from participating in any governmental decision which will have a foreseeable and material financial effect on his or her economic interests. However, the Commission has adopted a specialized regulation for educational decisions. That regulation provides that disclosure and disqualification is not required for teaching decisions and certain research decisions. (See Attachment 1.)

Consistent with this regulation, researchers with principal responsibility for a project (referred to as "principal investigators" or "PI"s) have had specialized disclosure and disqualification rules. However, the procedures that apply the specialized disclosure and disqualification rules have never been specifically set forth in a regulation. Proposed regulation 18755 would set forth the filing requirements for PIs. In addition, the proposed regulation codifies for the first time a list of nonprofits that need not be disclosed under these specialized rules. In the past the Commission has approved this list and additions to the list, but the list was only publicized by the UC (currently on the UC website) and has never been codified before.

II. Promulgation of Conflict of Interest Codes for Non-APA Agencies

A. Background

The conflict of interest provisions of the Act prohibit public officials from making, participating in making, or attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) The prohibition ensures that public officials perform their duties free from bias caused by their financial interests or the financial interests of persons who have supported them. (Section 81001(b).) To further this goal, the Act requires public officials to report their economic interests each year on their SEI.

Designated employees must disclose only those economic interests that are described in their agency's conflict of interest code. (Sections 87300 - 87309.) A "designated employee" includes any officer, employee, or consultant of any agency whose position with the agency is exempt from the state civil service system or is designated in a conflict of interest code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 82019.)

Section 87302 describes the substantive provisions an agency must include in its code.

1. Terms of the Code: The terms of the code comprise the main body of a code and include such provisions as the manner in which to report financial interests, the disqualification procedures, etc. As noted above, the Commission recommends that

agencies incorporate the standard code in regulation 18730 by reference because the type of information required to be in the main body of the code is quite complex. The Commission regularly amends regulation 18730 to include legislative and regulatory changes that affect the main body of the code; therefore this component of an agency's code is automatically kept in compliance with the Act.

2. Designated Positions: The code must specifically list positions that make or participate in making decisions. Typically, positions that involve voting on matters, negotiating contracts, or making recommendations on purchases without substantive review must be included in codes.

3. Disclosure Categories: A primary purpose of the code is to require disclosure of those types of investments, interests in real property, sources of income and business positions that officials may affect in their decision-making.

Codes are not effective until they have been approved by an agency's code reviewing body (section 87303). The code reviewing body for city agencies is the city council. The code reviewing body for an agency wholly within a county is the county board of supervisors. The code reviewing body for multi-county and state agencies is the Commission.

Section 87311 provides the process by which codes for state agencies are developed and adopted:

“The review of proposed Conflict of Interest Codes by the Commission and by the Attorney General and the preparation of proposed Conflict of Interest Codes by state agencies shall be subject to the Administrative Procedure Act. The review and preparation of Conflict of Interest Codes by local government agencies shall be carried out under procedures which guarantee to officers, employees, members, and consultants of the agency and to residents of the jurisdiction adequate notice and a fair opportunity to present their views.”

Regulation 18750(c) provides that an agency proposing a conflict of interest code or an amendment to an existing code must: conduct a public hearing or establish a written comment period; prepare an initial proposed code or an initial proposed amendment and prepare a notice of intention to adopt a conflict of interest code or to amend an existing code.

The regulation further provides that the agency must file a copy of the notice with the Office of Administrative Law for publication in the California Notice Register at least 60 days before the public hearing or close of the comment period; file a copy of the notice with the Commission at least 45 days before the public hearing or close of the written comment period; provide notice to the public, including notice to each employee of the agency affected by the proposed code or amendment at least 45 days before the hearing or the close of the comment period; make the exact terms of the proposed code or

amendment available for inspection and copying to interested persons for at least 45 days prior to the public hearing or the close of the comment period; accept written comments; and conduct a public hearing on the proposed code or amendment if requested by an interested party.

However, certain state agencies, such as the UC and the Legislature, are not subject to the APA. Due to this fact, over the years the Commission staff and these agencies have developed hybrid procedures for enacting codes and code amendments. For example, the UC Board of Regents notices proposed amendments to its conflict-of-interest code through the Wall Street Journal, the Los Angeles Times and the San Francisco Chronicle. In addition, the UC Regents also notify by letter each individual holding a newly proposed designated position. This process has been in place since as early as 1977. Staff is asking the Commission to codify a procedure for agencies not subject to the APA.

B. Discussion of Proposed Regulatory Action

The staff proposal mirrors the language and process of regulation 18750 (Procedures for the Promulgation and Adoption of Conflict of Interest Codes for State Agencies) and inserts it into a new regulation 18750.2 (Procedures for the Promulgation and Adoption of Conflict of Interest Codes for State Agencies Exempt from the Administrative Procedures Act). Regulation 18750.2 differs from 18750 only in the elimination of the requirement that the proposed code or code amendment be noticed in the fashion required by the APA. Staff has included alternative means to ensure that the proposed code is developed in a manner that guarantees to officers, employees, members, and consultants of the agency and to residents of the jurisdiction, adequate notice and a fair opportunity to present their views. (Section 87311.) The two options are:

OPTION A

[(A) Posting the notice on the home page of the agency website.]

OPTION B

[(A) Posting the notice on the home page of the agency website, and]

[(B) Publication in major northern California newspaper of general circulation, a major southern California newspaper of general circulation, and a major newspaper with statewide circulation (such as the Wall Street Journal, the Los Angeles Times and the San Francisco Chronicle).]

The Commission may choose either option, and if publication in a newspaper is required, may choose any number of publications or any specific publications the Commission finds appropriate.

III. List of Exempt Organizations

A. Background

Prior to 1981, the disqualification and disclosure requirements of the Act applied only to university administrators with “institution or campus-wide administrative responsibilities.” (Regulation 18702.4(c)(1)(B).) In 1981, in response to a case involving use of UC research for the personal benefit of the PI, the Commission added a requirement that PIs disclose economic interests if a research project was to be funded by a nongovernmental entity.

As noted above, regulation 18702.4(c)(2) now provides:

“Disclosure shall be required under Government Code section 87302 or any Conflict of Interest Code in connection with a decision made by a person or persons at an institution of higher education with principal responsibility for a research project to undertake such research, if it is to be funded or supported, in whole or in part, by a contract or grant (or other funds earmarked by the donor for a specific research project or for a specific researcher) from a nongovernmental entity, but disqualification may not be required under Government Code sections 87100, 87302 or any Conflict of Interest Code in connection with any such decision if the decision is substantively reviewed by an independent committee established within the institution.”

Thus, under the Act, disclosure and disqualification is not required with respect to decisions made by persons who have research responsibilities at the University of California concerning the allocation of financial and material resources for academic research, and all decisions relating to the manner or methodology with which the research will be conducted. This regulation effectively places these types of decision-makers outside the disclosure provisions of the Act except under the circumstances discussed below.

Disqualification: Unlike other public officials, PIs may accept research funding from private sponsors and continue to make governmental decisions even though they have a disqualifying conflict of interest under section 87100. This could be the case where the PI has an interest in a sponsor of the research, but the independent review committee substantively reviews and approves the funding because the project furthers the mission of the university. Under the proposal, disqualification is still not required in connection with any such decision if the decision is substantively reviewed by an independent committee established within the institution.

Disclosure: The existing system is set forth in the university policy on disclosure of financial interest in private sponsors of research (April 26, 1984, Attachment 2) which is posted on the UC’s website.

- Each PI fills out the 700U when notified that a nongovernmental entity intends to award a gift or research grant. PIs disclose economic interests in the sponsor of research which is funded in whole or in part: (a) through a contract or grant with a nongovernmental entity, or (b) by a gift from a nongovernmental entity which is earmarked by the donor for a specific PI.
- Disclosure statements must be filed: (a) before final acceptance of such a contract, grant, or gift; (b) when funding is renewed; and (c) within 90 days after expiration in the case of a contract or grant, or after funds have been completely expended in the case of a gift.
- PIs disclose income from and ownership interest in the sponsor, as well as positions held with the sponsor.

Both the Commission and the UC have agreed to a list of certain sponsors that do not pose a significant threat of a conflict of interest based on their size and national reputation in the field. This list has been maintained by the UC. The UC approaches the Commission when it wishes to modify the listing. Entities are added based on the following criteria:

- A. The nonprofit organization has been in existence for an extended period of time.
- B. The nonprofit organization does not receive major funding from, nor is it tied to, a corporate source.
- C. The nonprofit organization has a national reputation.
- D. The nonprofit organization serves, or funds research in, a broad geographic area.

If the researcher has no financial relationship to the sponsor, then the disclosure statement is labeled “negative.” A statement is “positive” where there is a financial interest. An independent campus committee reviews “positive” statements for conflicts of interest. Independent campus review committees are made up of faculty and, at some campuses, student or public members. The committees review all positive statements pertaining to applications to do research which are funded by private monies. The review is based on the following guidelines:

- Is a traditional conflict-of-interest situation avoided?
- Is the research appropriate for the university?
- Are teaching and research environments open?
- Are publication and dissemination of research results unrestricted?

- Is it in the best interests of the university that the private sponsor has exclusive licensing rights?
- Is use of university facilities and resources appropriate?

The UC also uses a streamlined process under certain circumstances. This process requires only abbreviated documentary justification when there is a:

- Renewal of funding with no change or a reduction in the researcher's financial involvement and no material change in the terms under which the research is being conducted.
- Completion statements with no change or a reduction in the researcher's financial involvement.
- Offer of private funding and the PI's involvement is limited to:
 - (a) Membership on a scientific advisory board.
 - (b) Income between \$250 and \$1,000 and the income is not derived from consulting related to the project being funded.
 - (c) An investment between \$1,000 and \$10,000 in a publicly-traded stock.

B. Discussion of Proposed Regulatory Action

Staff proposes two regulatory changes.

Amend Regulation 18702.4: Regulation 18702.4 is amended simply to cross reference new regulation 18755, which provides greater specificity to the disclosure obligations of PIs. Since regulation 18702.4 is primarily a disqualification provision, staff has opted to place the disclosure rules in a new regulation, regulation 18755.

Adopt New Regulation 18755 -- Statements Of Economic Interest: Person or Persons at an Institution of Higher Education with Principal Responsibility for a Research Project

Subdivision (a) describes when filing of an SEI may be triggered. It provides:

“(a) Disclosure shall be required under Government Code section 87302 or any Conflict of Interest Code in connection with a decision made by a person or persons at an institution of higher education with principal responsibility for a research project to undertake such research, if it is to be funded or supported, in whole or in part, (1) through a contract or grant with a nongovernmental entity, or (2) by a gift from a nongovernmental

entity which is earmarked by the donor for a specific principal investigator.”

The latter subdivisions are all technical in nature:

- Subdivision (b) describes types of filings, including “initial” filings, “interim,” and “final” filings.²
- Subdivision (c) describes the content of statements generally.
- Subdivision (d)(1) codifies the list of exempt private entities (see draft regulation 18755 in Attachment 1: Proposed regulations).
- Subdivision (d)(2) codifies the criteria that are applied for inclusion on the list of exempt entities as noted above.

Staff Recommendation: Staff recommends the Commission authorize staff to notice all the regulatory proposals for adoption.

Attachments:

1. Proposed regulations 18702.4, 18750.2, and 18755
2. University Policy on Disclosure of Financial Interest in Private Sponsors of Research (April 26, 1984.)

² Note that the University of California has requested that the final statement requirement be eliminated.